SUPREME COURT, U. S.

MAR 13 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1225

ROADWAY EXPRESS, INC.,

Appellant,

vs.

DIRECTOR, DIVISION OF TAXATION,

Appellee.

On Appeal from the New Jersey Supreme Court

JURISDICTIONAL STATEMENT

NICHOLAS CONOVER ENGLISH,
Attorney for Appellant,
550 Broad Street,
Newark, New Jersey, 07102.

Of Counsel:

McCARTER & ENGLISH,
550 Broad Street,
Newark, New Jersey, 07102.

BUCKINGHAM, DOOLITTLE & BURROUGHS,
Second National Building,
Akron, Ohio, 44308.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS INVOLVED	5
STATEMENT OF THE CASE	5
THE FEDERAL QUESTIONS ARE SUBSTANTIAL	7
1. Does New Jersey tax the privilege of doing business or something more?	8
2. It is of importance that this Court declare whether Spector Motor Service v. O'Connor is still the law	12
CONCLUSION	13
APPENDIX:	
A—Opinion of Supreme Court of New Jersey	1a
B—Judgment of Supreme Court of New Jersey	26a
C—Opinion of Division of Tax Appeals	27a
D—Petition of Appeal	47a
E—Stipulation of Facts	50a

Cases Cited

American Oil Co. v. Neill, 380 U. S. 451 (1965)	9
Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U. S. 182 (1945)	3
General Motors Corp. v. Washington, 377 U. S. 436 (1964)	12

PAGE

Interstate Circuit v. City of Dallas, 387 U. S. 903 (1967), opinion below, 402 S. W. 2d 770 4

Lawrence v. State Tax Comm., 286 U. S. 276 (1932) .. 8

Loving v. Virginia, 388 U. S. 1 (1967) 3

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157 (1954) 3

Memphis Steam Laundry v. Stone, 342 U. S. 389 (1952) 12

Murdock v. Pennsylvania, 319 U. S. 105 (1943) 10

National Bellas Hess, Inc. v. Department of Revenue, 386 U. S. 753 (1967) 3

Nelson v. Sears, Roebuck & Co., 312 U. S. 359 (1941) .. 9

Norfolk & Western Ry. v. Missouri State Tax Comm., 389 U. S. 810 (1967), issues summarized, 36 U. S. L. W. 3056 4

Northwestern Cement Co. v. Minnesota, 358 U. S. 450 (1959) 10, 12

Postal Telegraph Cable Company v. Adams, 155 U. S. 688 (1895) 11

Railway Express Agency, Inc. v. Virginia, 347 U. S. 359 (1954) 3, 12

Railway Express Agency v. Virginia, 358 U. S. 434 (1959) 11

Roadway Express v. Kingsley, 37 N. J. 136, 179 A. 2d 729 (1962) 6fn

Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602 (1951) 7, 7fn, 12, 13

PAGE

Spector Motor Service v. McLaughlin, 139 F. 2d 809 (2d Cir. 1943) 12

Spector Motor Service v. Walsh, 135 Conn. 37, 61 A. 2d 89 (1948) 7fn, 8, 10

Society for Savings v. Bowers, 349 U. S. 143 (1955) .. 9

Southern Pacific Co. v. Gallagher, 306 U. S. 167 (1939) 9

Werner Machine Co. v. Director of Taxation, 17 N. J. 121 (1954), Id. 350 U. S. 492 (1956) 3, 9, 11

Wisconsin v. J. C. Penney Co., 311 U. S. 435 (1940) .. 9

United States Constitution Cited

Article I, Section 8, Clause 3 ..... 1, 2, 5, 6, 12

Statutes Cited

L. 1945, c. 162, p. 563 ..... 2, 4

p. 573 11

N.J.S.A. 54:10A-1 (Corporation Business Tax Act, 1945) 2, 4

N.J.S.A. 54:10A-2 ..... 5, 8

N.J.S.A. 54:10A-19.2 2

N.J.S.A. 54:10A-21 11

28 U.S.C.:

Sec. 1257 ..... 3, 4

Rules Cited

Rule 13(2) 1

Rule 15 1

IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No.

ROADWAY EXPRESS, INC.,

Appellant,

vs.

DIRECTOR, DIVISION OF TAXATION,

Appellee.

JURISDICTIONAL STATEMENT

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this statement of the basis upon which it contends (1) that the United States Supreme Court has jurisdiction on direct appeal to review the final judgment of the New Jersey Supreme Court, entered December 18, 1967, affirming the judgment of the State Division of Tax Appeals, that as applied to the appellant, which is engaged exclusively in interstate commerce, the imposition of the New Jersey Franchise Tax did not violate the Commerce Clause of the United States Constitution, and (2) that it should exercise that jurisdiction in this case.

Opinions Below

The opinion of the New Jersey Supreme Court of this action is officially reported at 50 N. J. 471, and unofficially reported at 236 A. 2d 577. Copies of the opinion and judgment of that court are attached hereto as Appendix A and Appendix B, respectively. A copy of the opinion of the State Division of Tax Appeals, dated December 20, 1965, which has not been reported, is attached hereto as Appendix C.

Jurisdiction

(i) The Director, Division of Taxation of the Treasury Department of the State of New Jersey, entered a determination on August 29, 1962, that appellant was liable for franchise taxes for the years 1946 to 1960 inclusive, pursuant to the Corporation Business Tax Act (1945), L. 1945, c. 162, p. 563; N.J.S.A. 54:10A-1, *et seq.* In accordance with the provisions of N.J.S.A. 54:10A-19.2 appellant filed a petition of appeal from that determination with the Division of Tax Appeals, asserting that appellant's activities in New Jersey had been exclusively in interstate commerce and that by virtue of the Commerce Clause of the United States Constitution, Art. I, §8, Cl. 3, the State of New Jersey had no power to impose the said tax upon appellant. A copy of said petition of appeal is attached hereto as Appendix D. The State Division of Tax Appeals affirmed the determination of the Director, and its decision was, in turn, affirmed by the New Jersey Supreme Court.

(ii) The judgment of the New Jersey Supreme Court which is sought to be reviewed, is dated and was entered on December 18, 1967. Notice of appeal was filed by appellant in the New Jersey Supreme Court on February 19, 1968.

(iii) The jurisdiction of the United States Supreme Court to review the decision and judgment of the New Jersey Supreme Court is conferred by 28 U.S.C. §1257, which reads:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

(iv) Cases which sustain the jurisdiction of this court to entertain an appeal under the quoted statute are as follows:

Charleston Federal Savings & Loan Ass'n v. *Alderson*, 324 U. S. 182, 185 (1945);

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U. S. 157 (1954);

Railway Express Agency, Inc. v. *Virginia*, 347 U. S. 359 (1954);

Werner Machine Co. v. *Director of Taxation*, 350 U. S. 492 (1956);

National Bellas Hess, Inc. v. *Department of Revenue*, 386 U. S. 753 (1967);

Loving v. *Virginia*, 388 U. S. 1 (1967).

Also, this court has recently noted probable jurisdiction in two other cases when the state court upheld state legislation that had been challenged as invalid under the Federal Constitution:

Interstate Circuit v. *City of Dallas*, 387 U. S. 903 (1967); opinion below 402 S. W. 2d 770;

Norfolk & Western Ry. v. *Missouri State Tax Comm.*, 389 U. S. 810 (1967); issues summarized 36 U. S. L. W. 3056.

The case at bar falls squarely within 28 U.S.C. §1257.

(v) Appellant contends in this proceeding that the New Jersey Corporation Business Tax Act, L. 1945, c. 162, p. 563; N.J.S.A. 54:10A-1, *et seq.* is invalid and unconstitutional as applied to a foreign corporation whose activities in New Jersey are limited exclusively to interstate commerce. No questions as to the amount of the tax, or the calculation thereof, are involved on this appeal. The only relevant section of the statute is believed to be N.J.S.A. 54:10A-2, which provides:

> "54:10A-2. *Franchise tax, annual payment in lieu of taxes upon intangible personal property; 'doing business in state' defined*
>
> "Every domestic or foreign corporation which is not hereinafter exempted shall pay an annual franchise tax for the year one thousand nine hundred and forty-six and each year thereafter, as hereinafter provided, for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State. And such franchise tax shall be in lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act.
>
> "A foreign corporation shall not be deemed to be doing business, employing or owning capital or

property in the State, for the purposes of this act, by reason of (1) the maintenance of cash balances with banks or trust companies in this State, or (2) the ownership of shares of stock or securities in this State if such shares or securities are pledged as collateral security, or deposited with one or more banks or trust companies or brokers who are members of a recognized security exchange, in safekeeping or custody accounts, or (3) the taking of any action by any such bank or trust company or broker, which is incidental to the rendering of safekeeping or custodian service to such corporation. L. 1945, c. 162, p. 563, §2."

Questions Involved

Appellant being a foreign corporation whose activities in New Jersey are limited exclusively to interstate commerce:

A. Is the tax imposed by N.J.S.A. 54:10A-2 in its operating incidence an excise tax on the franchise of appellant to do business in New Jersey?

B. Under the Commerce Clause of the United States Constitution, Art. 1, §8, I. 3, does New Jersey have the constitutional power to impose a franchise tax under N.J.S.A. 54:10A-2 upon appellant?

Statement of the Case

There is no dispute as to the facts. A stipulation of facts was filed with the State Division of Tax Appeals (Appendix, E). The facts are fairly summarized in the opinion of the New Jersey Supreme Court (50 N. J. 477-481; 236 A. 2d 580-582; *infra* pp. 6a-10a). Suffice it to say for present purposes that appellant is a Delaware corporation having its home office in Akron, Ohio; that it is a com-

mon carrier of general freight by motor vehicle, operating pursuant to certificates of convenience and necessity issued by the Interstate Commerce Commission; that it has never been authorized, or made application to be authorized, by New Jersey to do business in that State; that all of the freight carried by appellant within the State of New Jersey moves in interstate commerce, none of it having both a point of origin and a destination within the State of New Jersey; that maintenance and operation of terminals and a sales force in New Jersey were, as stated by the New Jersey Supreme Court, "so intimately connected with the exclusively interstate freight business that, under current law, they are not to be classified separately as intrastate in character for state taxation purposes" (50 N. J. 480; 236 A. 2d 582; *infra* p. 10a).

The Federal question of the unconstitutionality under the Commerce Clause of the imposition of the corporation business tax upon appellant was raised in the petition of appeal from the determination of the Director of the Division of Taxation to the State Division of Tax Appeals (App. D, p. 48a).*

* Believing, as was borne out by subsequent developments, that there were no disputed facts and that the only issue was the question of the constitutionality of the imposition of the tax, appellant, even prior to filing its petition of appeal to the State Division of Tax Appeals, filed an action in the New Jersey Superior Court seeking relief in lieu of prerogative writ and for a declaratory judgment that the tax statute was unconstitutional as applied to appellant. The New Jersey Supreme Court affirmed the dismissal of the complaint on the ground of plaintiff's failure to exhaust its administrative remedy, *Roadway Express* v. *Kingsley*, 37 N. J. 136, 179 A. 2d 729 (1962). The issue of constitutionality is stated in that opinion at 37 N. J. 138 and 140, 179 A. 2d 730 and 731. See statement in opinion below, 50 N. J. 475; 236 A. 2d 579; *infra* pp. 3a-4a.

The Federal Questions are Substantial

The issues raised on this appeal involve not only the proper meaning and effect of the Commerce Clause, but also the vitality and applicability of a prior decision of this Court, *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951).

The New Jersey Supreme Court, in the able opinion below, recognized and accepted the doctrine illustrated by *Spector* that a franchise tax on a foreign corporation engaged exclusively in interstate commerce, and levied solely on the privilege of doing such business in the state, is constitutionally forbidden under the Commerce Clause (see 50 N. J. 492, 236 A. 2d 588; *infra* p. 23a). The Court sought to escape the application of this doctrine (1) by viewing the New Jersey tax as being imposed upon something more than the privilege of doing business, attempting to distinguish the taxing statute in *Spector* from the one here involved, and (2) by hypothesizing in any event that this Court would no longer follow *Spector*. Appellant challenges both propositions.

The legal issues are sharply presented, since the Court below held that appellant's activities in New Jersey were to be considered as being exclusively in interstate commerce (50 N. J. 480; 236 A. 2d 582; *infra* p. 10a); that the Spector Company "conducted an exclusively interstate trucking business in Connecticut in a manner not significantly different from Roadway" (50 N. J. 486; 236 A. 2d 585; *infra* p. 16a);* and that the New Jersey tax "is a fran-

* Compare the facts at bar (50 N. J. 477-481; 236 A. 2d 580-582, *infra* pp. 6a-10a) with those in *Spector* as stated in *Spector Motor Service* v. *Walsh*, 135 Conn. 37, 61 A. 2d 89 at 93 (1948), and by this Court in 340 U. S. 602 at 606-607.

chise, i.e. a privilege, impost'' (50 N. J. 481; 236 A. 2d 582, *infra* p. 11a). Moreover, appellant did not challenge below and does not challenge here, the validity or propriety of the apportionment formula for calculating the tax under either the due process clause or the equal protection of the laws clause of the Federal Constitution, so considerations of those kinds do not enter into the case at bar.

1. Does New Jersey tax the privilege of doing business or something more?

Appellant contends that the New Jersey tax, in substance—in its operating incidence—is imposed simply on its privilege of doing business, and that in essence the tax is indistinguishable from the Connecticut tax involved in *Spector*. The Court below ruled otherwise, holding that the New Jersey tax is imposed on certain privileges in addition to that of doing business, namely, the privilege of employing or owning capital or property, or maintaining an office in New Jersey, and the privilege of exercising its corporate franchise in the State (50 N. J. 492; 236 A. 2nd 588, *infra* pp. 23a-24a). Appellant says that all of these privileges viewed realistically are paraphrases and mean nothing more than the privilege of doing business, and that it is significant that they are all listed in the statute, N.J.S.A. 54:10A-2 under the heading "'doing business in state' defined". Apparently, the New Jersey legislature, like appellant, believed that these privileges are all comprehended within that of "doing business".

Notwithstanding this ruling of the New Jersey Supreme Court, it is open to this Court to determine for itself the practical effect, the operating incidence, of the tax, and upon the basis of its own determination, to pass upon the constitutionality of the tax.

Lawrence v. *State Tax Comm.*, 286 U. S. 276, 280 (1932);

Southern Pacific Co. v. *Gallagher,* 306 U. S. 167, 177 (1939);

Wisconsin v. *J. C. Penney Co.,* 311 U. S. 435, 443 (1940);

Nelson v. *Sears, Roebuck & Co.,* 312 U. S. 359, 363 (1941);

Society for Savings v. *Bowers,* 349 U. S. 143, 151 (1955);

Werner Machine Co. v. *Director of Taxation,* 350 U. S. 492, 493 (1956);

American Oil Co. v. *Neill,* 380 U. S. 451, 455 (1965);

In *American Oil Company* v. *Neill, supra,* this Court, per Warren, C.J., stated at 380 U. S. 455:

> "When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 443-444; *Lawrence* v. *State Tax Comm'n.,* 286 U. S. 276, 280 and cases cited therein. This approach requires us to determine the ultimate effect of the law as applied and enforced by a State or, in other words, to find the operating incidence of the tax. *Connecticut Gen. Life Ins. Co.* v. *Johnson,* 303 U. S. 77, 80."

It is impossible to perceive how the privilege of exercising a corporate franchise can mean, in practical effect, anything different from a corporation's doing business. Obviously, if a corporation does anything at all lawfully, it is exercising the powers granted in its corporate franchise. It is equally difficult to perceive how a corporation

can own capital or property without its thereby doing business. Similarly, if a corporation maintains an office, it is doing business. The operating incidence of the New Jersey tax is no different, in substance, from that of the Connecticut tax involved in *Spector*. In this respect, therefore, there is no meaningful distinction between the *Spector* case and the case at bar.

Parenthetically, by owning property in New Jersey, appellant has subjected itself to substantial real estate taxes —$125,674.00 over a ten year span, of which amount, $75,068.00 was paid during the two years following the acquisition of the present Kearney Terminal (*infra* p. 60a). As a consequence of doing business in New Jersey, appellant paid, without protest, various New Jersey taxes in 1960, totaling $89,943.00 (50 N. J. 481; 236 A. 2d 582; *infra* p. 10a) as against which the corporation business tax for 1960 would amount to $7,334.50 (50 N. J. 481; 236 A. 2d 582; *infra* p. 10a). It is obvious that a corporation that does business in New Jersey or owns or employs capital or property in the state, does pay substantial state taxes for such privileges, even though it be exempt from the corporation business franchise tax. Appellant admits that it does business in New Jersey but says that since it is a foreign corporation engaged solely in interstate commerce, New Jersey cannot, consistently with the Commerce Clause, impose a franchise tax upon its privilege of doing so.

Murdock v. *Pennsylvania*, 319 U. S. 105, 113 (1943);

Northwestern Cement Co. v. *Minnesota*, 358 U. S. 450, 463-464 (1959).

A foreign corporation engaging solely in interstate commerce in New Jersey is exercising a privilege which New Jersey can not tax, since it is a federal privilege protected

by the Commerce Clause. Owning capital or property in New Jersey as part of the exercise of such federal privilege must be equally exempt from a state franchise tax.

Nor is the tax rendered valid merely because it is in lieu of an ad valorem tax on intangibles as the court below erroneously held (50 N. J. 483-490; 236 A. 2d 583-586, *infra* pp. 13a-19a). A tax cannot be saved from unconstitutionality merely because a different scheme might have been imposed a lawful levy.

A *property* tax in lieu of all other taxes may be validly imposed upon a foreign corporation engaged solely in interstate commerce, *Postal Telegraph Cable Company* v. *Adams*, 155 U. S. 688, 698 (1895); *Railway Express Agency* v. *Virginia*, 358 U. S. 434 (1959)*, provided that "payment be not made a condition precedent to the right to carry on the business", *Postal Telegraph Cable Company* v. *Adams*, *supra*, 155 U. S. 696. However, payment of the New Jersey tax is made a condition of the right to carry on business, L. 1945, c. 162, p. 573, §21; N.J.S.A. 54:10A-21. Moreover, it has been uniformly held, and was reiterated in the opinion below that the tax here involved is a franchise, or privilege, impost (see opinion below, 50 N. J. 481; 236 A. 2d 582, *infra* p. 11a) and is not a property tax, *Werner Machine Company* v. *Director of Division of Taxation*, 17 N. J. 121, 125 (1954); Id. 350 U. S. 492, 493 (1956).

There are clearly questions of substance presented by this appeal, such as should be determined by this Court, as to the operating incidence of the tax under review and as to the validity of such tax under the Commerce Clause.

---

* The state court opinion in this case, 199 Va. 589, 100 S. E. 2d 785, makes it clear that the tax was a property tax and not an excise upon the privilege of doing business, 100 S. E. 2d 789-791, 795.

2. It is of importance that this Court declare whether *Spector Motor Service v. O'Connor* is still the law.

Spector Motor Service v. *O'Connor*, 340 U. S. 602 (1951) has been frequently cited by this court as authoritative, and it has never been overruled or adversely criticized in an opinion of the Court. Indeed, all of the opinions of this Court in which *Spector* has been cited seem to recognize and accept its authority.

Memphis Steam Laundry v. Stone, 342 U. S. 389, 393 (1952);

Railway Express Agency v. *Virginia*, 347 U. S. 359, 368 (1954);

Northwestern Cement Company v. *Minnesota*, 358 U. S. 450, 463 (1959);

General Motors Corp. v. *Washington*, 377 U. S. 436, 446 (1964).

The learned court below—disregarding the admonition of Judge Learned Hand: "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time but whose birth is distant;" *Spector Motor Service* v. *McLaughlin*, 139 F. 2d 809, 823 (2d Cir. 1943),—concluded that this Court today would not follow *Spector*, 50 N. J. 487; 236 A. 2d 585, *infra* p. 17a. It is important that there be no doubt of the position of this Court on an issue so fundamental and of such far reaching practical significance as the proper application of the Commerce Clause of the United States Constitution to a state tax imposed upon a foreign corporation engaged solely in interstate commerce.

If jurisdiction of this appeal is not noted, every tax authority of every State in the nation will conclude that

Spector is dead. The fate of *Spector* should be determined not by the speculating of the Court below that this Court would no longer follow it, but by the decision of this Court on the merits.

CONCLUSION.

For the reasons stated, the questions presented by this appeal are substantial and are of importance to the appellant and to the State of New Jersey, as well, and also, to the commerce of our nation and to the public in general. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

NICHOLAS CONOVER ENGLISH,
550 Broad Street,
Newark, New Jersey 07102,
Attorney for Appellant.

Of Counsel:

McCARTER & ENGLISH,
550 Broad Street,
Newark, New Jersey 07102.

BUCKINGHAM, DOOLITTLE & BURROUGHS,
Second National Building,
Akron, Ohio 44308.

[APPENDICES FOLLOW]